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Surviving a Governmental Investigation without a Black Eye: Key Legal, Communications and Crisis Response Considerations for Nonprofits

May 20, 2014

Venable LLP

Washington, DC

Moderator:

Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists:

Jamie Moeller, Ogilvy Public Relations

Kathy Baird Westfall, Ogilvy Public Relations

Ronald M. Jacobs, Esq., Venable LLP

Presentation

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Surviving a Governmental Investigation without a Black Eye: Key Legal, Communications and Crisis Response Considerations for Nonprofits

Tuesday, May 20, 2014, 12:30 p.m. – 2:00 p.m. ET

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Upcoming Venable Nonprofit Events

Register Now

June 18, 2014 – Performance Management and Discipline in Nonprofits: Common Pitfalls, Unique Challenges, Effective Solutions

July 17, 2014 – Key Trademark and Copyright Rules for Nonprofits to Follow – and Break!

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Upcoming Venable Nonprofit Events
Mark Your Calendars

August 13, 2014 – Privacy and Data Security for Your Nonprofit: Understanding Your Legal Obligations and Insuring against Risk

September 16, 2014 – What's Ahead for 2015: Preparing Your Nonprofit's Group Health Plan for the Employer Mandate

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Agenda

- Protecting Brands in Turbulent Times
  - Crisis Characteristics and Origin
  - Crisis Management Protocol
  - Crisis Action Steps
- Trends, Platforms, and Data
  - Trends
  - Corporate Responses
  - Social Media Opportunity
  - A Social Media Crisis Framework
- Legal Considerations
  - Common Legal Issues in an Investigation
  - Planning Ahead and Risk Management
  - Protecting Your Information
  - Interacting and Negotiating with the Government
  - Internal Investigations
  - Congressional Hearings

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Protecting Brands in Turbulent Times

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Issue vs. Crisis

- **Crisis** – *An event that immediately stops the work of the day in order to handle. It can affect the viability of a company. It is most often a reactive situation.*
- **Issue** – *A problem that, while important, can be contained with adequate advance planning and follow-up. If handled incorrectly, an issue can turn into a crisis.*

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7 Characteristics of a Crisis

1. Sudden change in circumstances
2. Insufficient information
3. Escalating flow of events
4. Beginning of loss of control
5. Intense scrutiny from outsiders and insiders
6. Beginning of the siege mentality
7. Panic

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Where Do Crises Begin?

INTERNAL	EXTERNAL
▪ Industrial Accident/Environmental Issue	▪ Natural Catastrophe
▪ Investigation/Lawsuit/Fine/Settlement	▪ Terrorist/Criminal Threat/Incident
▪ Poor Financials/Stock Performance	▪ Activist Issue/Protest
▪ Structure/Ownership Issue (M&A, etc.)	
▪ Management Change/Dismissal	
▪ Incident/Allegation of Mismanagement	
▪ Incident/Allegation of Wrongdoing	
▪ Consumer Complaint/Issue	
▪ Product Defect/Recall	
▪ Employee Complaint/Issue	
▪ Labor Dispute	
▪ Workplace Injury/Fatality	

Of the 15 major crisis categories, only 3 have predominantly external triggers.

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Crisis Management Protocol

Planning	Preparation	Management	Outcomes
• Identify vulnerabilities • Identify key stakeholders for each potential crisis • Identify crisis teams for specific situations • Establish crisis control center and communications channels • Identify third-party resources • Develop preliminary messages • Establish protocols for engaging the media and affected parties • Establish 24/7 monitoring system	Tabletop Exercises Test plans and protocols Live Exercises	Media Engagement Utilization of Social Media Channels Direct Stakeholder Engagement	• Less bureaucracy and improved response time • Better position to shape story • Point of view reflected in media reports • Demonstrates that the company is on top of its affairs and alleviates confusion and speculation • May prevent escalation to larger crisis

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Action Steps

Preparation	First 3 Hours	First 6 Hours	First 24 Hours	Ongoing	Outcomes
• Vulnerability assessment • Crisis planning • Third-party development • Tabletop exercise • Message development • Materials development • Resource and asset mapping • Social media audit • Monitoring	• Validate situation • Alert crisis team • Convene team meeting • Increase monitoring frequency • Institute preliminary protocol • Identify Needs	• Begin to implement tailored plan • Leverage third-parties • Tailor approach for specific incident • Prioritize activities • Tailor messages for specific incident • Develop additional material including statement, fact sheet, etc.	• Communicate with key stakeholders • Release materials to the press • Conduct interviews • Engage with online influencers • Conduct outreach to offline influencers • Monitor for, and correct, inaccuracies	• Hold morning and afternoon meetings to review progress • Depending on intensity, institute war-room with permanent monitoring and response, staffed by government and Ogilvy personnel • Analyze impact of messaging and revise as appropriate	• Voice in media reports • Larger share of voice • Helped establish correct context and frame the situation • Potentially shorter duration • Potentially less criticism

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Value of Planning

According to a study by the insurance firm Marsh, every $1 spent in crisis planning is worth $7 in losses averted.

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Trends Work in Combination with Platforms and Data

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Trend 1:

Massively Parallel Processing: The Mouse That Roared

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Trend 2:

I Am a Camera

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Trend 3:
Convening the Masses

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Trend 4:
Data, Data Everywhere

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Corporate Responses

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Social Media Opportunity

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Opportunity 1:

Crowd-Sourced Information

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Opportunity 2:

Hyper-communications

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Opportunity 3:
Compelling Narratives

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Opportunity 4:
One-to-Many/One-to-One

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Opportunity 5:

Tracking Sentiment in Real Time

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A Social Media Crisis Framework

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Legal Considerations

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Common Legal Issues in an Investigation

- Document production
- Internal investigation
- Witness interviews
- Congressional hearings
- Private lawsuits
- Criminal investigations

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Before the Storm

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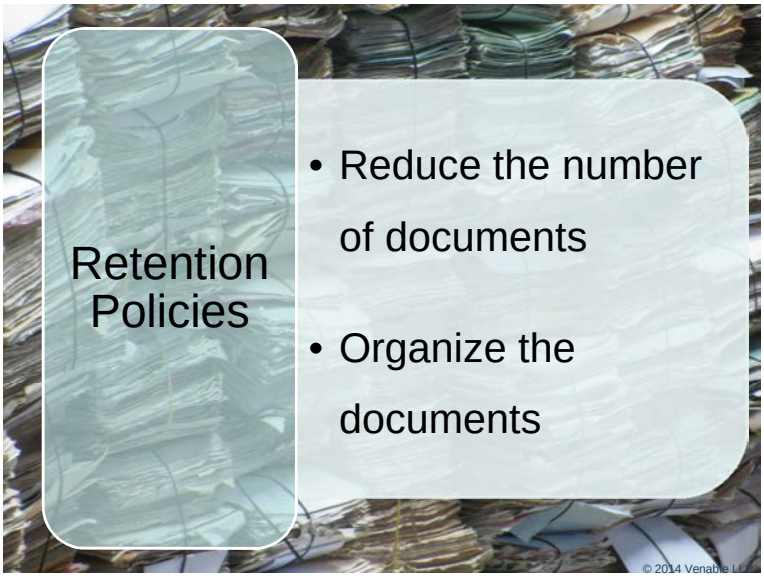
Planning Ahead

Documents



Risk Management

- Board
- Senior management
- Information flow

Controls

- Theft
- Regulatory filings
- Policy development
- Public communications

A Plan

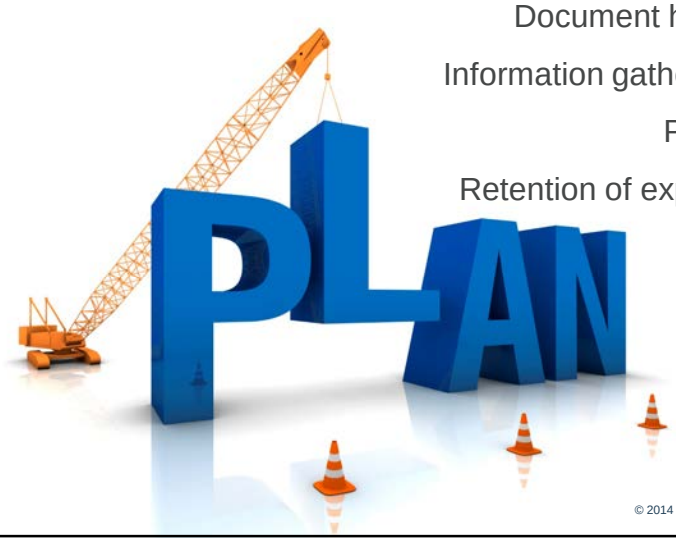
Organizational notifications

Document holds

Information gathering

Press

Retention of experts



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In the Storm

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Protecting Your Information

- Have the lawyer hire the experts
  - PR
  - Internal investigations
- Carefully review documents to be produced
- Congress isn't big on the attorney-client privilege
- Consider who in the organization gets the information

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Interacting with the Government

- Different strategies with different agencies
- Consider relative power/authority
- Consider negotiating position
- Develop good relationships

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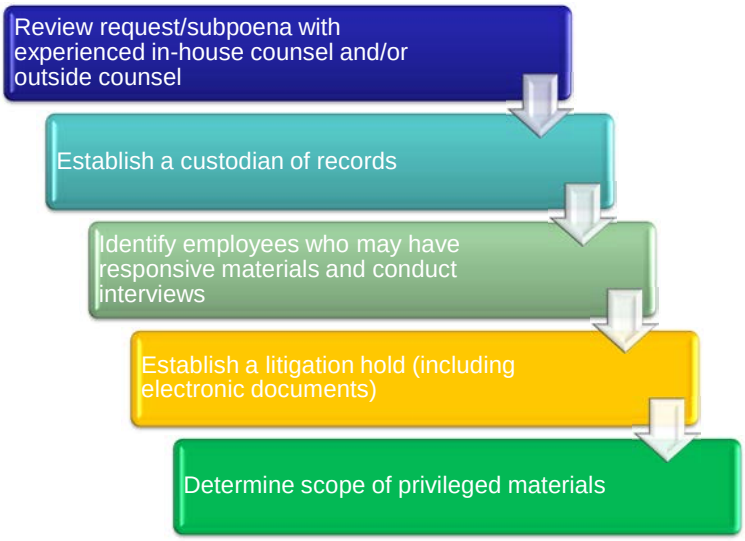
Document Requests/Subpoenas



Electronic Documents

- Meet with Company I.T.
- Identify electronic media covered by subpoena
- Don't forget all removable/portable media
- Preserve electronic documents covered by request/subpoena
- Suspend electronic document destruction procedures and policies
- Consider hiring an outside vendor

Negotiate with Government

- Negotiate the scope of the request
  - What does the Government want?
  - What does the Government need?
  - What is practical to obtain?
  - What is practical to provide?
- Format of production
  - Paper vs. electronic
  - E-mails
- Timing of production
  - Rolling vs. set date
- Confidential and/or privileged documents

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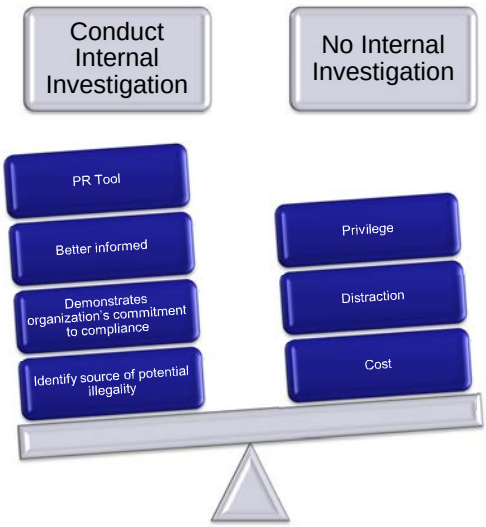
Internal Investigation



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Employee/Officer Interviews

- Be sure document collection and fact-gathering are complete before agreeing to interviews
- Conduct mock interviews to prepare employee/officer

Congressional Hearings

- Written testimony should be prepared with counsel
- Identify allies on the committee
- 18 U.S.C. § 1001
- Conduct mock Q&A
- Pleading the Fifth
- PREPARE, PREPARE, PREPARE

Questions?

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To view an index of Venable's articles and presentations or upcoming seminars on nonprofit legal topics, see www.Venable.com/nonprofits/publications or www.Venable.com/nonprofits/events.
To view recordings of Venable's nonprofit programs on our YouTube channel, see www.youtube.com/user/VenableNonprofits.

Speaker Biographies

VENABLE® LLP

our people

Jeffrey S. Tenenbaum

Partner

Washington, DC Office

T 202.344.8138 F 202.344.8300

jstenenbaum@Venable.com

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media. He also has served as an expert witness in several court cases on nonprofit legal issues.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal*'s Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the prestigious 2012 *Legal 500* rankings, and one of only eight in the 2013 rankings. Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in the 2012-14 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was named as one of Washington, DC's "Legal Elite" in 2011 by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

AREAS OF PRACTICE

Tax and Wealth Planning
Antitrust
Political Law
Business Transactions Tax
Tax Controversies and Litigation
Tax Policy
Tax-Exempt Organizations
Wealth Planning
Regulatory

INDUSTRIES

Nonprofit Organizations and Associations
Credit Counseling and Debt Services
Financial Services
Consumer Financial Protection Bureau Task Force

GOVERNMENT EXPERIENCE

Legislative Assistant, United States House of Representatives

BAR ADMISSIONS

District of Columbia

REPRESENTATIVE CLIENTS

AARP
Air Conditioning Contractors of America
American Academy of Physician Assistants
American Alliance of Museums
American Association for the Advancement of Science
American Bar Association
American Bureau of Shipping
American Cancer Society
American College of Radiology
American Institute of Architects
American Society for Microbiology
American Society for Training and Development
American Society of Anesthesiologists
American Society of Association Executives

EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

B.A., Political Science, University of Pennsylvania, 1990

MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

America's Health Insurance Plans
Association for Healthcare Philanthropy
Association of Corporate Counsel
Association of Private Sector Colleges and Universities
Auto Care Association
Biotechnology Industry Organization
Bocuse d'Or USA Foundation
Brookings Institution
Carbon War Room
The College Board
CompTIA
Council on CyberSecurity
Council on Foundations
CropLife America
Cruise Lines International Association
Design-Build Institute of America
Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
Goodwill Industries International
Graduate Management Admission Council
Habitat for Humanity International
Homeownership Preservation Foundation
Human Rights Campaign
Independent Insurance Agents and Brokers of America
Institute of International Education
International Association of Fire Chiefs
International Sleep Products Association
Jazz at Lincoln Center
LeadingAge
Lincoln Center for the Performing Arts
Lions Club International
Money Management International
National Association for the Education of Young Children
National Association of Chain Drug Stores
National Association of College and University Attorneys
National Association of Manufacturers
National Association of Music Merchants
National Athletic Trainers' Association
National Board of Medical Examiners
National Coalition for Cancer Survivorship
National Council of Architectural Registration Boards
National Defense Industrial Association
National Fallen Firefighters Foundation
National Fish and Wildlife Foundation
National Hot Rod Association
National Propane Gas Association
National Quality Forum
National Retail Federation
National Student Clearinghouse
The Nature Conservancy
NeighborWorks America
Peterson Institute for International Economics
Professional Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Recording Industry Association of America
Romance Writers of America
Telecommunications Industry Association
Trust for Architectural Easements
The Tyra Banks TZONE Foundation
U.S. Chamber of Commerce
United Nations High Commissioner for Refugees
Volunteers of America

HONORS

Recognized as "Leading Lawyer" in the 2012 and 2013 editions of *Legal 500*, Not-For-Profit

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law, Washington, DC (Woodward/White, Inc.), 2012-14

Selected for inclusion in *Washington DC Super Lawyers*, Nonprofit Organizations, 2014

Recognized as a Top Rated Lawyer in Taxation Law in *The American Lawyer* and *Corporate Counsel*, 2013

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006

Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 500 articles.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 500 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine, The Chronicle of Philanthropy, The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal topics on Fox 5 television's (Washington, DC) morning news program, Voice of America Business Radio, Nonprofit Spark Radio, and The Inner Loop Radio.

Ogilvy Public Relations

JAMES MOELLER

Managing Director
Global Public Affairs
Ogilvy

Jamie Moeller directs Ogilvy Public Relations Global Public Affairs Practice, named 2012 Public Affairs Agency of the Year by *the Holmes Report*. In this role, he oversees a practice of more than 150 professionals operating in 30 markets around the world, assisting clients with brand reputation, policy communications and corporate positioning initiatives. Jamie oversees Ogilvy's integrated public affairs offering with its wholly owned lobbying affiliate, Ogilvy Government Relations—one of the premier government relations consultancies in Washington. Ogilvy's ability to build political support for clients' issues combined with strong relationships with key policy makers at all levels of government provides clients with the tools needed to succeed in major policy debates.

Jamie has led global public affairs campaigns for some of the agency's largest clients, including BP's "Beyond Petroleum" brand transformation and the development of the Lance Armstrong Foundation's Global Cancer Campaign. In addition, Jamie has overseen the public affairs component of a wide variety of integrated communications programs for clients such as Allegheny Energy, The American Chemistry Council, Constellation Energy, DuPont, Ford and MasterCard International. He has led reputation and issues management campaigns for Cadbury, Unilever, Johnson & Johnson, Lenovo, Mirant, Luxottica, and the University of Chicago among others. Jamie brings a deep understanding of the link between corporate reputation and the bottom line to these assignments. He recognizes that how a company handles a challenging situation will have a long-term impact on its reputation, and he provides clients with the counsel they need to manage issues in a manner that mitigates reputation damage and helps ensure the enduring strength of the corporate brand.

He is a sought after commentator on global communications issues, and his articles have been published in digital and print outlets around the world. He is a frequent speaker on communications issues, providing guest lectures at American University, Georgetown University, University of Maryland, Tsinghua University in Beijing and St. Petersburg University in Russia. He also serves as the Ogilvy representative to the US-China Business Council and the US-Pakistan Business Council.

Prior to Joining Ogilvy, Jamie directed a nonprofit organization in Washington, D.C. devoted to international trade and economic development. He also worked as the Washington, D.C. representative of former UN Ambassador Andrew Young, representing Ambassador Young on Capitol Hill and providing legislative and media counsel on a variety of issues affecting the federal budget, housing, trade and international affairs. Jamie also worked for a United States Senator in constituency relations. Jamie is an attorney and a member of the Maryland State Bar. He received his law degree at George Washington University and his bachelor's degree in Political Science and Economics at the University of Michigan. He is married with two sons.

Ogilvy Public Relations

KATHY BAIRD WESTFALL

Senior Vice President, Strategy
Social@Ogilvy
Ogilvy

Kathy Baird Westfall is a Senior Vice President at Ogilvy Washington where she leads the digital strategy team. As a senior strategist, Kathy oversees large integrated programs that incorporate digital and social channels across the disciplines of reputation management, public relations, marketing and advertising. Her client experience at Ogilvy includes digital and social media strategy for Blue Cross and Blue Shield, BP, DuPont and Atentiv. She has worked in the digital and integrated marketing space in both the agency and client environment for over 17 years, and her assignments have included corporate, association, government, nonprofit and academic programs.

In addition to her work at Ogilvy, Kathy is an adjunct professor for Digital Strategy at Georgetown University for the Public Relations and Corporate Communications Graduate School. Kathy created the school's first digital strategy curriculum and has taught classes at the University since 2008. Her classes incorporate the use of digital and social media activities across corporate communications, reputation management and crisis mitigation.

Prior to joining Ogilvy, Kathy led integrated marketing teams on large global accounts. Her previous client list includes Visa, Inc. where she led digital reputation campaigns across corporate communications initiatives, a trade association-based issues campaign for the snack foods industry and the Energy from Shale campaign for the American Petroleum Institute. Additional clients include Frito-Lay, Bloomberg, Booz Allen Hamilton, Sandoz, National Confectioners Association, FTC, Smithsonian Institute and Saudi Aramco among others. She also worked at Mindshare Interactive Campaigns where she led digital strategy programs for Easter Seals, Human Rights Campaign, UNICEF, Georgetown University, Pfizer and Novartis. Her work has earned several awards, including the Cannes PR Lion Shortlist Award, American Marketing Association M Award, the Pollie Award, and the Addy Award.

Kathy has also held global positions at several telecommunications companies, including MCI, WorldCom, UUNET, and WorldSpace, where she managed and executed large-scale branding and online marketing programs. These included digital crisis communications through the WorldCom bankruptcy, the development of corporate Web strategy, e-commerce, and online account management, as well as several large global rebranding initiatives, including the rebrand of WorldCom to MCI post-bankruptcy.

Kathy holds a bachelor's degree in political science from The George Washington University, and an international master's degree in business administration from Georgetown University. She also studied theater at the American Academy of Dramatic Arts in New York City. In her spare time she enjoys music, improv comedy and fitness activities.

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our people

Ronald M. Jacobs

Partner

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Ronald Jacobs serves as co-chair of Venable's Political Law Group and as hiring partner in the firm's Washington, DC office. He advises clients on all aspects of state and federal political law, including campaign finance, lobbying disclosure, gift and ethics rules, pay-to-play laws, and tax implications of political activities. Mr. Jacobs also assists clients with crises response to government investigations and enforcement actions, Congressional investigations, class-action law suits, and other high-profile problems that involve potentially damaging legal and public-relations matters. Along with Lawrence Norton, he co-edits the firm's Political Law Briefing blog.

Mr. Jacobs understands the often-contradictory rules imposed by the different laws that apply to political activities. He offers practical advice that considers not only the legal requirements, but also the reputational risk, of political activity to a broad range of clients, including large and small companies, trade associations, ideological groups, individuals, and political vendors. He has developed political compliance programs for Fortune 500 companies and other clients that lobby and make political contributions nationwide.

In addition to counseling clients on political law matters, Mr. Jacobs has extensive experience in the administrative rulemaking process and in litigating challenges to agency decisions in federal court. He has represented clients in administrative matters before the Federal Election Commission, the Merit Systems Protection Board, the Federal Trade Commission, the United States Congress, and in federal court.

Mr. Jacobs has also counseled and defended clients in a host of other regulatory matters, including disputes involving the Foreign Corrupt Practices Act, the Foreign Agents Registration Act, and privacy and data security issues.

SIGNIFICANT MATTERS

Some of Mr. Jacobs's significant matters have included:

- Successfully defending a large, nationally-known trade association during a Congressional investigation into allegations of fraudulent grassroots lobbying activity.
- Representing a campaign finance reporting company through an FBI investigation of a former business partner accused of campaign fraud, ultimately convincing the government to return assets that had been wrongly seized from the company.
- Assisting a large social welfare organization with multiple Congressional investigations and several class action lawsuits.
- Successfully petitioning the FEC to reverse a long-standing rule to allow trade associations to use payroll deduction for their PAC activities.
- Assisting a company in fending off government investigations and rebuilding its reputation following problems with a school program to attend the 2009

AREAS OF PRACTICE

Legislative and Government Affairs

Political Law

Tax-Exempt Organizations

Foreign Corrupt Practices Act and Anti-Corruption

Congressional Investigations

Appellate Litigation

Regulatory

Advertising and Marketing Litigation

INDUSTRIES

Nonprofit Organizations and Associations

Consumer Products and Services

Life Sciences

Consumer Financial Protection Bureau Task Force

BLOG

Political Law Briefing

GOVERNMENT EXPERIENCE

Field Representative, United States House of Representatives, Office of Representative Steve Chabot (R-OH)

BAR ADMISSIONS

District of Columbia

Virginia

COURT ADMISSIONS

U.S. Supreme Court

U.S. Court of Appeals for the D.C. Circuit

U.S. Court of Appeals for the Federal Circuit

U.S. District Court for the District of Columbia

U.S. Court of Appeals for the Seventh Circuit

U.S. District Court for the Eastern District of Virginia

U.S. Court of International Trade

EDUCATION

J.D., *high honors*, George Washington University Law School, 2001

Order of the Coif

Articles Editor, *The George Washington Law Review*

Imogene Williford Constitutional Law Award

B.A., *cum laude*, The George Washington University, 1997

Omicron Delta Kappa

MEMBERSHIPS

American Bar Association

Federalist Society, Free Speech and Election Law practice group

presidential inauguration.

- In a pro bono matter, convincing the DC Court of Appeals to establish new procedural protections for child custody cases similar to those used in many other states.
- Successfully litigating a Hatch Act case before the Merit Systems Protection Board involving a school district's ability to re-hire a teacher previously dismissed for campaigning for public office.
- Reversing a decision by Immigration and Customs Enforcement to revoke a language school's accreditation.

HONORS

Recognized in the 2011 - 2013 editions of *Chambers USA*, Government: Political Law, National

Included in "Rising Stars" edition of *Washington DC Super Lawyers*, 2013 and 2014

ACTIVITIES

Mr. Jacobs is a frequent speaker and author on campaign finance and lobbying regulation issues. He serves on the board of the Human Rights Foundation, a nonprofit organization dedicated to preserving democracy and protecting human rights in the Americas.

PUBLICATIONS

Mr. Jacobs has authored or co-authored a number or articles on campaign finance issues, the Telephone Consumer Protection Act, the Telemarketing Sales Rule (both of which govern the national do-not-call list), using the fax for marketing purposes, unsolicited email. Mr. Jacobs is also co-editor of the firm's Political Law Briefing blog.

SPEAKING ENGAGEMENTS

Mr. Jacobs has participated in a number of panel discussions and seminars on the impact of various communication and privacy regulations on trade and professional associations and other businesses. He has addressed GWSAE, ASAE, The Direct Marketing Association, and the Mortgage Bankers Association.

Additional Information

Natural Gas & Electricity
JOURNAL

Social Media in Crisis Response: 4 Trends, 5 Opportunities, and a Framework

Community Relations

By Peter Hirsch and Rachel Caggiano

April 16, 2014

The emergence of social media has had a profound influence on the communications challenges facing energy utilities.

Social media has arguably transformed the relationship between power companies and their stakeholders, in particular residential consumers, by enabling real-time interactions around the clock, 365 days a year. In no context is this more of a critical leap than in the context of a crisis, but the conventional wisdom about the new threat posed by social media in a crisis is significantly off the mark. In fact, social media, when used to their fullest extent, represent the most significant enhancement to the crisis management tools available to producers and distributors of power since the invention of the telephone.

At first blush, the benefits of social media in a crisis seem heavily outweighed by the risks. Indeed, the number of significant corporate crises originating through social media platforms has exploded in the past decade. In 2001, there was only one such crisis. In 2011, there were 10, and experts have made the sobering determination that 76 percent of these crises could have been prevented if the organization under fire had understood how to train and prepare their people on how to handle such crises.

Let us look at four megatrends that have changed the average crisis landscape and five key opportunities that the power industry now has at its fingertips. We will look at palpable changes that recent technology has made to the average crisis landscape. What this survey will quickly reveal is that it is the convergence of social, mobile, and location-based technologies that have enabled average citizens to take advantage of tools that allow them to be more collaborative and on the go, in real time and with triangulated accuracy.

TRENDS WORK IN COMBINATION WITH PLATFORMS AND DATA

It is not the social media platforms Facebook, Twitter, and YouTube themselves but rather these platforms in combination with the data they collect and provide that have given the public an extraordinary power to influence events.

Trend 1: Massively Parallel Processing: The Mouse That Roared

Before social media dethroned conventional media as the primary source of information on an issue, public knowledge on any given issue was confined to whatever news organizations could research and publish within the news cycle. The Internet and, even more so, social media have put searchable content from any source into the news feeds of the citizen as well as the inboxes of reporters. In the early days of the Internet, as captured in the famous *New Yorker* cartoon (“on the Internet no one

knows you're a dog"), it was assumed that the primary danger to truth would come from motivated but ignorant or biased individuals.

What the infamous *CBS Evening News* story about President George Bush's Texas Air National Guard service showed was that the Internet actually brought together disparate sets of amateur experts who could never have otherwise reached each other so quickly. It took no more than a few days for a motley group of obsessives to determine that the only typewriter that could have been used to produce the memo about the president's absences from duty had not yet been manufactured at the time of the supposed memo's writing. It was thus shown to be a forgery, to the great detriment of Dan Rather's legacy, by an impromptu committee of individuals who could have found each other in no other way.

Trend 2: I Am a Camera

No individual smartphone technology has played a bigger role in the social media impact on crisis management than the camera. The combination of picture quality and the smartphone's ability to enable instant dissemination to millions via Twitter or Instagram, just to name two platforms, has ensured that the time lapse between a crisis event and its reporting has dropped to zero. A prime example in this harrowing evolution is the video of the Boston Marathon bombings in 2013, captured by eyewitnesses while the detonations were still in progress.

Nor is speed the only aspect of the smartphone's impact. The visual image is an infinitely more powerful emotional signal than any text, and certain kinds of images have an incalculable ability to arouse passions and fuel outrage. Without the smartphone, it is almost impossible to imagine that upheavals in Tehran or the protests in Tahrir Square would have had the same outcomes.

The camera phone also reduces distance in startling ways. Whereas it might once have taken a professional camera crew several days to get to a natural disaster, for example, with the ability to upload satellite images, a member of the local community, no matter how remote, can now achieve the same result within seconds.

Trend 3: Convening the Masses

Authoritarian regimes have historically curtailed the citizens' rights of assembly for one very good reason: if enough people opposing them can get together, bad things tend to happen to the regime.

Social media have turned this fundamental principle into a force of cosmic proportions, for both good and ill. When a US pharmaceutical company refused to provide a cancer drug still in clinical trials to a Canadian man with end-stage disease on the grounds that he did not fit compassionate use criteria, the family was able to get 400,000 people to sign a petition within just weeks. On the negative side, this convening power has been used to increasing effect in getting product boycotts off the ground and to call together thousands for violent protests. Disaffected British youth used Blackberry Messenger with unerring accuracy in 2011 to transmit information about police strength and activity to their cohorts while looting shops in Britain's inner cities.

This type of spontaneous coming together does not necessarily fade away in the same fashion. Taking a page out of the social media playbook of President Obama's first campaign, conservative activists created and have sustained an entirely new US political movement, the Tea Party, which fields candidates and wins elections. Activist groups such as People for the Ethical Treatment of Animals and Greenpeace have become enormously adept at creating and sustaining public engagement in their campaigns by accurately replicating the most successful features of the strongest social media, having deeply studied the type of content and rhythms of refreshment and by delivering the right engagement opportunities across the entire spectrum of their stakeholders, from preteens to retirees.

Trend 4: Data, Data Everywhere

The potential for crises to fuel movements has been enormously enhanced by the vast increase in publicly available data sets. These data sets often provide powerful ammunition to activists in their own right but can also be spectacularly effective when mashed together. During the run-up to the California ballot initiative to restrict same-sex marriage, Proposition 8, opponents of the initiative were able to combine data on political contributions from supporters of the initiative with Google Maps to create interactive graphics to enable community boycotts of small businesses whose owners had made these contributions.

In the environmental space, public and frequently updated information about emissions from chemical and other manufacturing facilities, organized by ZIP code, has become a valuable tool for activists everywhere. The ability of the public to access this information readily has also created new tensions, even an expectations gap between what is permissible by law with respect to emissions and the layperson's beliefs about what should be permitted. Across every aspect of society—like food safety, financial regulation, and construction standards—increased transparency has created new opportunities for anticorporate initiatives. Social media content driven by secret videotaping of livestock facilities has created such paranoia in the food industry, for example, that industry leaders have tried to have so-called Ag-Gag laws passed, criminalizing the taping of animals in food production.

This brief overview demonstrates how significant the new demands are that social media have created for organizations in crisis, but do all the risks accrue to them and all the benefits to their detractors? It would certainly appear so. The lightning speed of events and the ease with which consumers can reach companies to complain and feed on each other would seem to pose an intolerable burden. But perhaps the matter is not so clear-cut.

CORPORATE RESPONSES

In order to assess the opportunity as well as the threat, we need to perform the thought experiment of putting ourselves back in the pre-Internet, pre–social media, pre-mobile era.

Let us pretend it is 1995 (not technically pre-Internet, but effectively so) and we are defending our organization in a major crisis in which we stand accused of harming consumers, as well as lying and obfuscating. In 1995, we could choose from a handful of channels to make our case. We could hold a press conference and hope that our perspectives came across accurately in the news coverage— and we could hope that our story came across in a seven-second sound bite or a 15-word quote. We could open a consumer hotline. We could run advertorials proclaiming our commitment to customers. We could even, as the Ford Motor Company famously did during the Ford/Firestone crisis, run prime-time television advertising to talk to the American people. These channels were and are both expensive and of dubious effectiveness.

Returning to 2014, we have a vastly wider and potentially more successful array of tools available to us, if we learn how to use them effectively. Even more importantly, social media platforms now enable us to reach our stakeholders in real time with specific responses to their specific concerns, in addition to broadcasting more general messages. Not only can we engage in better conversations with these stakeholders to explain our perspectives and assuage their concerns, but we can also use social media in a bidirectional way to help us manage and recover from the crisis itself, enabling us to deploy our resources more effectively to help the community.

This advantage is even more appropriate for power generation and distribution companies, whose physical assets are the ones most often challenged in a crisis.

SOCIAL MEDIA OPPORTUNITY

Taken as a whole, then, social media platforms give us unprecedented ability to connect with key stakeholders in real time, hear their specific concerns, and disseminate information back to them without the dilutive or distortive effect of intermediaries. We believe that there are five critical benefits that social media provide:

1. Better sources of crowd-sourced information about what is happening on the ground while the crisis events are under way
2. The ability to disseminate a wide range of information instantaneously
3. Communications tools that use the entire sensory portfolio through sound, text, picture, and moving image to help create a compelling narrative
4. The ability to switch back and forth between one-to-many and one-to-one communications as needed
5. The ability to track real-time sentiment

Opportunity 1: Crowd-Sourced Information

What Facebook and Twitter can do that could only be done poorly before is to provide us with information from the scene of a power outage, environmental incident, or workplace accident, to name just a few possible crisis scenarios.

Our ability to manage the reputational fallout of a crisis is powerfully correlated with our ability to make the right operational decisions in the crisis, and that ability is dependent on getting good information quickly. Thus, any time we can get better information faster will help us. Con Edison of New York used Twitter to enormous effect in the aftermath of Superstorm Sandy. The information that people tweeted back to Con Ed helped the company understand points of the greatest stress or threat and reach out to populations and locations with particularly urgent needs. Con Ed's "help vans" not only reached the right people quickly, but also were able to respond to specific needs for help.

In the intense stress and confusion of a major crisis such as Superstorm Sandy, the company used crowd-sourced information to complete its own picture of the storm's effect on the community.

Opportunity 2: Hyper-communications

One of the most frequent complaints heard by utilities in the immediate aftermath of a crisis event is that the company did not provide accurate or adequate information on issues such as power restoration, safety, or security of personal property. When a coal-fired plant on the Hudson River in New York owned by Mirant suffered a boiler explosion in 2001, the community's biggest fear was asbestos in the ash that rained down on houses and cars. Had Twitter and Facebook been available then, Mirant could have immediately instructed residents on what was and was not safe to do with the ash, received photographs of damage for compensation purposes, and kept residents abreast of changing conditions hour by hour.

Opportunity 3: Compelling Narratives

As we see whenever we open or log on to the daily newspaper, the most compelling narratives are those amplified by heart-wrenching photographs.

Our nightly news and news magazine shows are also filled with moving (literally and figuratively) images of people with tragic stories to tell about corporate misdeeds. Prior to social media, it was very hard for companies to balance these stories with equally compelling narratives. Their response has historically focused on rational arguments and data, numbers of homes with restored power, number of power lines repaired, and the numerical scale of the response, but lacked the power of emotional communications.

Today, real-time video of company personnel helping residents can be posted on Facebook or YouTube within minutes, and the gratitude of people being helped in the moment can be tweeted out to create a much richer and warmer human portrait of a company responding in a crisis, both to post on the company's own platforms and share with the traditional media. Twitter has even been used to correct inaccurate news broadcasts in real time. During the Gulf Oil Spill of 2010, BP communications staffers tweeted a correction to a CNN news report while it was still going on. The tweet was read by the station's producers and communicated to the anchor while he was still in the middle of the same segment, and he amended his description in real time.

Opportunity 4: One-to-Many/One-to-One

Companies on the defensive in the midst of a crisis live in fear of the social media terrorist, the online agitator whose posts and tweets place his anger and outrage in front of the whole world.

While there are certainly always flamethrowers whose main purpose is to get attention rather than have their problem solved, most initially negative posters can be made reasonable through careful one-on-one handling. This positive approach is why we advise companies to try to get a negative poster/tweeter into a one-on-one conversation as quickly as possible. This strategy works surprisingly well in most situations, and in many cases the negative voice will turn positive, or at least grudgingly neutral.

We observed a related effect in 2009 when Maclaren, the British manufacturer of baby strollers, was embroiled in a crisis over several babies' fingers that were crushed in the strollers' hinges. In the first days, their Facebook page saw a torrent of outraged commentary, but as the response expanded, it was the company's own customers who started to fire back at the most negative flamers. Handling negative responses on social media is not without challenges, and it can be galling to see such attacks in public places.

One solution that is almost always poorly received is taking down negative comments or shutting down an account. This tactic not only inflames the most critical but also undermines a company's supporters by making the company seem weak or defensive.

Opportunity 5: Tracking Sentiment in Real Time

Conventional sentiment tracking during a major crisis has been done using online and telephone surveys on a daily or weekly basis. This tool is still valuable but has essentially been replaced by other equally or more powerful metrics—the intensity and duration of the social media conversation about the crisis, the positive or negative content of that conversation, and finally the search intensity and search-term map being used by stakeholders during the crisis. A wide range of social media tracking providers, such as Radian6, Crimson Hexagon, Visible—as well as the social media platforms' own back-ends, such as Facebook Insights, can produce highly specific data by geography and demographic to help identify whether the company's messages are getting through to their intended audiences.

This type of active listening to inform real-time optimization has become a critical component of any crisis management system.

A SOCIAL MEDIA CRISIS FRAMEWORK

Notwithstanding our view of the benefits to be derived from social media in a crisis, a sure hand is still required to make the best use of the opportunity and avoid errors that can inflame stakeholders. Through our work in social media, we have established four principles that underpin successful social media management in a crisis.

1. Readiness: In addition to standard measures of crisis preparedness, social media preparedness can require additional vigilance. Unlike traditional public relations channels, social media responsibility in large organizations is often diffusely allocated. Whereas the communications department may be responsible for content, it is often a digital strategy or even an IT group that actually controls the posting of that content. In order to respond effectively in a crisis, it is vital that protocols for drafting, approving, and posting materials to social media platforms are established well in advance. In view of the speed of response required in social media, sample tweets and Facebook postings need to be preapproved for the most likely kinds of crisis scenarios so that as little time as possible is lost.

2. Radar: The social conversation is going on all the time, and a well-prepared organization should not enter that conversation for the first time when a crisis hits. Knowing who the online influencers are who cover your space and understanding their networks, who they reach, and how they think is vital. It is equally important to understand how the communities in which you

operate communicate in social media. The time to introduce yourself to the online versions of those communities is before the crisis occurs.

3. Response: Responding in social media requires a different tone of voice than traditional corporate communications. While it is still important to observe appropriate legal guidelines and the persona of an organization, social media is what people use to communicate on a person-to-person basis, and they react negatively to communications that sound “corporate” or distant. Finding the tone of voice that is right for your organization is something that should be honed over time so that in a crisis your concern for the stakeholder comes through authentically in this new type of communications environment.

4. Recovery: Once the immediate crisis is past, it is often tempting for organizations to try to return to business as usual quickly. In social media, this can lead to unintended negative consequences. As in any kind of crisis, the crisis is only over when those most impacted believe it is over, and this holds doubly true in social media. Companies need to be very cautious in retiring the special communications content established during the crisis prematurely. The video of the CEO or the Q&A posted to Facebook needs to stay in place until the crisis has truly been resolved. It is at that point that the reputation recovery process can begin, and social media channels are the perfect ones to offer stakeholders a way to rebuild their trust in the company.

In conclusion, we know from experience that, handled with skill and with the right mix of internal and external resources, social media is a truly powerful force for companies to protect and even strengthen their reputation with their key stakeholders.

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Point of Order:
An Insider's Guide to Surviving Congressional Investigations

"I have here in my hand a list of two hundred and five [people] that were known to the Secretary of State as being members of the Communist Party and who nevertheless are still working and shaping the policy of the State Department" – Senator Joseph R. McCarthy (R-WI).

Much of the public's understanding of congressional hearings was shaped by Senator McCarthy's 1951 hearings into the United States Army. They were the first televised congressional hearings in American history, and the image of an overbearing and verbally abusive Senator shouting over witnesses and repeatedly screaming the catch-phrase "point of order" left an indelible impression on the American public.

More recently, Congress has turned its attention to more legitimate topics, including: excessive executive compensation; food recalls and the safety of the food supply; use of TARP funds; corporate tax havens; credit card fees and practices; the safety of imported toys; waste, fraud and abuse in government contracts at home and in Iraq and Afghanistan; backdating of stock options; steroid use in sports; the Enron debacle; abusive tax shelters; money laundering; fraud at the United Nations; tax abuse by corporations and government contractors; and abuses in the credit counseling industry. Though today's hearings have little of McCarthy's bombast, they are public, often televised, and rarely offer a positive outcome for the witnesses called to testify. Depending on the committee, congressional investigations and oversight hearings can be a mixture of political theater, investigative tool, forum for policy development, and soap box. Merely being forced to testify under oath can permanently scar the public's perception, resulting in damaging economic consequences for companies and professional consequences for individuals.

The single most important thing organizations involved in a congressional hearing can do is be prepared. Organizations exponentially increase the possibility of a positive outcome during a congressional hearing or investigation by retaining qualified counsel, thoroughly investigating the facts at issue, and understanding the rules, players, and process of the committee conducting the hearing. Qualified counsel will know how to help your company develop a nuanced response strategy that:

- Unambiguously tells your side of the story;
- Minimizes any collateral damage from a public hearing; and
- To the greatest extent possible, prevents the dissemination of privileged, confidential or propriety information.

This article provides some insight into the different phases of a congressional investigation, the critical differences between criminal proceedings and congressional investigations, the legal devices committees and subcommittees utilize in their investigations, and the basic rules of congressional hearings.

Current Investigations Agenda

The general consensus in Washington is that very few topics falling under the jurisdiction of House and Senate oversight committees will be left unexamined. In addition to responding to issues as they appear in the headlines, the following are but a few examples of topics which likely will be examined by the oversight committees/subcommittees in the 111th Congress:

- **Senator Carl Levin** (D-MI), Chairman of the Senate Permanent Subcommittee on Investigations, is aggressively investigating such issues as corporations with subsidiaries in off-shore "tax havens" and whether certain tax breaks are being used consistent with Congressional intent.

- **Reps. Henry Waxman** (D-CA), Chairman of the House Energy and Commerce Committee, and **Bart Stupak** (D-MI**)**, Chairman of the Oversight and Investigations Subcommittee, intend to examine such issues as nuclear power plant safety, prescription and OTC drug marketing practices, safety of the food supply, hospital-acquired infections, business practices in the individual health insurance marketplace, and medical device safety.

- The new Chairman of the House Committee on Oversight and Government Reform in the 111th Congress, **Rep. Edolphus "Ed" Towns** (D-NY), intends on focusing the Committee's attention on such issues as private sector contracting reform, use of TARP funds by financial institutions, as well as the rights and duties of federal employees.

- Ferreting out waste, fraud and abuse in federal contracting is such an enormous undertaking that the Senate Homeland Security and Governmental Affairs Committee created a new subcommittee to examine half a trillion dollars a year in federal contracts. **Senator Claire McCaskill** (D-MO) will head the new Ad Hoc Subcommittee on Contracting Oversight and has indicated that she expects to hit the ground running.

- **Senators James Webb** (D-VA), **Claire McCaskill** (D-MO) and **Susan Collins** (R-MA) have been actively engaged in investigating defense contractors within their respective committees and by chartering and supporting the Commission on Wartime Contracting in Iraq and Afghanistan.

Since congressional hearings occur in an open forum and are often televised, witnesses are put in the unenviable position of publicly

defending themselves – or their organizations – from a representative making accusations of corruption or criminal wrongdoing.

Who can forget the image of Roger Clemens testifying under oath before a "standing room only" crowd at the House Oversight Government Reform Committee, which was investigating Clemens' alleged use of steroids as a major-league baseball player? Clemens' aggressive and unwavering denials rang hollow and led to his referral to the Department of Justice to determine whether the seven-time Cy Young award winner lied to Congress. His reputation and his career are tarnished forever because of the accusations made at that congressional hearing and his inability to respond in an appropriate manner.

Thorough preparation by qualified legal counsel can help individuals and organizations facing the scrutiny of a congressional investigation minimize the damage to their personal and professional reputations.

Congress' power to investigate

Congress' power to investigate is plenary. Thus, Congress and its committees and subcommittees have enormous power to get information from private citizens and organizations. Typically, Congress uses its investigative power to aid legislative functions, such as passing legislation, overseeing government agencies, investigating regulated activities, or confirming government appointees such as Ambassadors and Supreme Court Justices.[i]

Congress and its committees and subcommittees have several legal instruments at their disposal when conducting congressional investigations. All committees can ask for voluntary cooperation from subjects of the investigation. Some committees, such as the Senate Homeland Security and Government Affairs Committee and the House Oversight and Government Reform Committee, have the power to issue supoenas *duces tecum* for documents and supoenas *ad testificandum*, requiring testimony from individuals at a deposition or a congressional hearing. They may also grant immunity in certain situations, and hold witnesses in contempt.

Beginning an investigation

Congressional committee hearings may be broadly classified into four types: *legislative, oversight, investigative, and confirmation.*[ii] Members of Congress may initiate investigations when they discover or identify issues that require new or updated legislation or congressional oversight. Topics for investigations might come from any number of sources, such as an exposé in a press article, a tip from a whistleblower, or notification from the Government Accountability Office. While some members of Congress do not publicize their investigatory activities, others will issue press releases announcing their call for an investigation. Thereafter, when required by rule, committees or subcommittees vote to launch an investigation, and staff investigators will begin researching the issue to determine the pertinent facts and witnesses.

Chairman's Letters and subpoenas duces tecum

Once the staff identifies relevant witnesses, the committees will request documents related to the investigation. They can do so in two

different manners. One method, called a "Chairman's Letter," is a voluntary request. The second method is issuance of a subpoena *duces tecum*, which requires documents to be produced by a specific date under penalty of law.

Receipt of a Chairman's Letter or subpoena *duces tecum* is generally how an organization first learns that it is involved in a congressional investigation. It is also the point when fear and concern often arise. Because involvement in such investigations is a rare occurrence, most organizations do not have contingency plans to assess and respond to congressional subpoenas. This can put the organization's staff in the difficult position of trying to determine, on their own, what constitutes a responsive document while rushing to meet an impending deadline.

A qualified law firm with experience in congressional investigations can greatly assist an organization in this situation. Such a law firm can:

- Build a good-faith working relationship with congressional staff;
- Negotiate with staff investigators and often limit the scope of the subpoena;
- Get an extension of the subpoena's return date and effectuate "rolling productions" of requested documents if necessary; and
- Allow the organization to focus on running its day-to-day business.

The firm also can assist the organization by taking over primary responsibility for the response, gathering the appropriate documents, reviewing them for substance, cataloguing them, and delivering them to staff investigators.

Applicability of the attorney-client privilege

The doctrine of separation of powers has a substantial impact on two basic legal principles: the attorney-client privilege and the work-product doctrine. Simply stated, the common law rules of the judiciary do not apply to the legislative branch. Specifically, neither the attorney-client privilege nor the attorney work-product doctrine has any basis in law with respect to the legislative branch of government.

The applicability of attorney-client privilege and the work-product doctrine rests solely in the discretion of the congressional committee, regardless of whether or not a court would uphold the claim. While most congressional committees will respect the attorney-client and work-product protections, it is by no means guaranteed that they will do so. In fact, there have been numerous occasions where Congress has refused to respect these protections. Because the application of the privilege and doctrine is discretionary, it is best to have a qualified law firm assist the organization in arguing that these most basic tenets of American law and fairness are applicable and should be respected by the committee.

Interviews

Unfortunately, complying with a "Chairman's Letter" or subpoena *duces tecum* is not always the end of the congressional inquiry. On the contrary, it is often only the beginning. Based on a review of the documents, staff investigators will refine their list of the organizational representatives they would like to interview. If the organization hires a law firm, the staff investigator will often informally request through the firm that specific witnesses make themselves available for interviews.

Arguably, the single most important part of any congressional investigation for an organization is the interview. How an organization and its witnesses respond will directly impact the tenor of any subsequent hearings. Furthermore, if the congressional staff believe that an organization is acting in good faith, this greatly increases the likelihood that the congressional representative conducting the hearing will also. It is imperative that the organization, its staff, and legal counsel establish a good-faith working relationship with the congressional staff in order to negotiate the potential scope of the interview and to maximize the protection the committee might afford to trade secrets or privileged information.

Likewise, all witnesses must work with the law firm to prepare thoroughly before participating in these interviews. The law firm must have in-depth knowledge of all of the facts pertinent to the congressional investigation and understand each witness's knowledge of those facts. If the law firm does its job appropriately, it will be in a position to determine whether the organization or the organization's witnesses have any potential criminal and/or civil liability that may be exposed in the interview. If there is possible criminal and/or civil exposure, the organization may want to decline to participate in the interview, a decision which must be determined on a case-by-case basis. To determine if there is possible civil or criminal exposure, organizations should have the law firm conduct a limited internal investigation into the subject area of the congressional hearing. By having the law firm conduct the internal investigation, any information discovered during the process will be protected by the attorney-client privilege and the attorney work-product doctrine, thereby keeping it from the reach of criminal prosecutors and civil litigants.[iii]

Should the organization decide to participate in an interview, there are two ways in which it may occur: the voluntary interview or the deposition. The goals of both are the same – to gather information relating to the congressional investigation – but the methods with which they are undertaken are markedly different.

The differences between a voluntary interview and a deposition

The voluntary interview can be more relaxed and less formulaic than a deposition.[iv] Often, the individuals present include the staff investigator(s), the witness, and the witness's attorney(s). The staff investigator will ask questions related to the investigation and the witness should respond truthfully. The witness's attorney is there to advise the witness during the interview; ensure that the staff investigator does not ask inappropriate questions, make sure the witness answers all questions appropriately, and take accurate notes detailing the staff investigator's questions and the witness's answers.

The deposition is similar to the informal interview, but is taken under oath and a stenographer is present to record the entire proceeding. The transcript is provided to the members of the committee for their review and they may publicly release it.[v] Certain legal ramifications arise because statements made during the interview are taken under oath and recorded by a stenographer. First, if witnesses make any false statements, the government can potentially charge them with perjury. Second, because there is a written record, others may use the transcript to impeach these witnesses at any later judicial proceeding.

Even if the statement is not taken under oath, witnesses may still face criminal sanctions if they make a false statement. For example, 18 U.S.C. § 1001(2) criminalizes the making of "any materially false, fictitious, or fraudulent statement or representation" in any matter within the jurisdiction of the legislative branch of government. This includes congressional investigations and any relating interviews or depositions. Another possible criminal charge is obstruction of proceedings before departments, agencies, or committees (18 U.S.C. § 1505). Therefore, if there are any doubts concerning the completeness or veracity of a witness's testimony or if there is a parallel criminal investigation, it may be prudent to consider declining the offer to participate in any voluntary interviews.

Deciding to participate in the interviews does not mean that the organization's involvement in a congressional investigation is complete. The interview is, generally, just the intermediate step in the investigative process. Most often, staff investigators will follow up the interview by telephoning or sending a letter to the law firm asking if the organization's witnesses will "voluntarily" appear at a congressional hearing. However, if the corporate witnesses refuse "voluntarily" to appear, the committee or subcommittee can simply issue a subpoena *ad testificandum* compelling the witness to appear or risk having the committee or subcommittee hold him or her in contempt.

The congressional hearing

General Overview

Most congressional committees and subcommittees require witnesses to provide a written statement detailing their proposed testimony. The written statement is, most often, the basis for any opening statement made by the witness. It is often submitted to the committees via email.

A lengthy written statement should provide the committee with the information it needs to understand the organization's position on the issue. The oral presentation, however, should be concise and highlight the most pertinent aspects of what the witness wants to tell the committee regarding the subject matter at hand.

While an organization does not have a Fifth Amendment right against self-incrimination, the privilege may be applicable to its witnesses. If witnesses invoke their Fifth Amendment privilege against self-incrimination, they should do so in a manner that leaves no doubt as to their intention. If they make the mistake of explaining why they are invoking the Fifth Amendment, they run the risk of inadvertently waiving the very right they are relying on for protection. In those cases, the committee chair will determine whether the witness has waived the right.

The Hearing

Generally, all congressional hearings follow roughly the same format. Each member, starting with the chairperson, gives an opening statement. Then the witnesses are introduced and, if the committee is required or chooses to, sworn in. The witnesses are then allowed to give a brief opening statement, which most often is a summarized version of his or her written statement. Once the witnesses finish their opening statements, each committee member is afforded the opportunity to question the witnesses. While this is often referred to as the "five-minute rule," the length of time for questioning varies between committees. Once the first round of questioning is complete, the committee may decide to continue questioning the witnesses, excuse the witnesses, call the next panel of witnesses, or close the proceedings. If the chairperson chooses to end the questioning and the hearing, he or she often will make a final statement.

There is no limit to the types of questions committee members can pose to a witness. However, if a committee member asks a question that the witness believes is irrelevant or not within the jurisdiction of the committee, the witness may object to the question through the chairperson. It is then up to the chairperson to decide whether to order the witness to answer the question. If the chairperson decides to allow the question, the witness must answer. If, however, the chairperson determines the question is irrelevant, the witness does not have to answer. However, most chairpersons will not rule a fellow committee member's question out of order.

Contempt

If a witness refuses to answer questions or refuses to comply with a congressional subpoena, the committee or subcommittee may attempt to hold the witness in contempt. Congress has three types of contempt power: Congress' inherent contempt power, criminal contempt, and civil contempt – which applies only to the Senate.

Congress has not used its inherent contempt power in more than 60 years. However, if Congress chose to use it today, the Sergeant at Arms would bring the witness before the House or Senate and he or she would be tried by that body. If the witness is held in contempt, he or she may be imprisoned in the Capitol jail for a specified period of time, until the end of that congressional session, or until the witness decides to provide testimony to the committee or subcommittee.

The second method of bringing a contempt charge against a witness involves charging the witness with criminal contempt pursuant to the provisions of 2 U.S.C. §§ 192 and 194. Section 192 provides that a person who has been summoned to appear before Congress or one of its committees and willfully fails to deliver documents as ordered or, having appeared, refuses to answer questions under inquiry is guilty of a misdemeanor, punishable by a fine not more than $100,000 or less than $10 and imprisonment not less than one month nor more than 12 months. Section 194 provides that the contempt citation must first be approved by the subcommittee, then by the full committee, and finally by the full House or Senate where the Speaker of the House or the President of the Senate certifies the contempt charge. Congress then sends the contempt citation to the appropriate U.S. Attorney and it is his or her "duty" to bring the matter before the grand jury.

Finally, the Senate has a civil contempt option, which is not available to the House of Representatives. Under this option, a federal district court must, at the request of the Senate, issue an order to the witness compelling him to testify or produce requested documents. If the witness continues to refuse, the court may, in a summary proceeding, impose sanctions to impose compliance.

Government Accountability Office and Inspectors General

An additional tool often utilized by Congress is a supplementary investigation performed by either the Government Accountability Office (GAO) or the Inspector General of a specific government department or agency. As a result, an organization can face simultaneous inquiries from three separate investigatory bodies. For example, on November 16, 2006, the Senate Permanent Subcommittee on Investigations held a hearing on the Defense Travel System (DTS)[vi] where both the Acting Inspector General of the Department of Defense and the Director of the Financial Management & Assurance Team from GAO testified concerning the findings of their separate inquiries into DTS. This testimony supplemented the investigation performed by the subcommittee staff.

Parallel Investigations

In addition to the supplementary tools mentioned above, the current emphasis on oversight to root out waste, fraud and abuse increases the likelihood that the target of an investigation by one body will be simultaneously investigated by another. Accountability and oversight are the buzz words of the day with respect to the current Administration and Congress. In fact, funding for oversight and investigations and more stringent regulations have been a highly touted element of recent stimulus programs. Any Congressional or government entity that suspects impropriety falling within its area of responsibility is likely to at least consider conducting its own investigation.

Such parallel investigations require especially adept counsel to consider such issues as preserving privileged information, conveying a consistent truthful message, and negotiating with investigative entities to minimize duplication of effort and disruption to the client's business and personal resources. In addition, there is an ever-increasing web of laws and regulations creating the potential for criminal or civil liability for even unintentional misstatements or omissions. For example, a government contractor who cooperatively discloses information to a Congressional Committee may have an obligation to self-report the same information to an Inspector General under a new federal Mandatory Reporting Rule and could be barred from working on any future contracts for failure to do so.

Conclusion

Congressional investigations and hearings are unique proceedings that have separate and distinct rules which differ from traditional litigation as practiced by most law firms or legislative advocacy as practiced by most lobbying shops. In addition to those key differences, each committee and subcommittee has its own unique rules and history. These factors make responding to a congressional investigation a complex and delicate task.

Thorough preparation and retention of qualified counsel exponentially increase the possibility of a positive outcome during a congressional hearing or investigation. Qualified counsel will thoroughly investigate the facts at issue, and bring understanding of the committee, rules, players and processes that will drive the investigation. They will help your company develop a nuanced response strategy that will unambiguously tell "your side of the story," minimize any collateral damage from a public hearing and, to the greatest extent possible, prevent the dissemination of privileged, confidential or propriety information.

Without a doubt, the 111th Congress faces a nation which is frustrated with, and angry at, many corporate segments of the American economy; those who find themselves in the crosshairs of an aggressive committee and fail to acknowledge the seriousness of that frustration and anger expose themselves to unnecessary danger. Congressional leaders have made it abundantly clear that the 111th Congress will continue to engage in thorough oversight and numerous investigations. Perhaps most portentous, is that this avowed aggressiveness is being applied to polarizing issues, such as the spiraling costs of healthcare, energy, and the war on terror. Organizations that previously had little reason to fear congressional oversight may find themselves publicly testifying before Congress. Any failure to fully prepare may lead not only to harsh judgment in the court of public opinion, but to additional congressional hearings, or indictment by a Federal Grand Jury.

Raymond Shepherd's first hand knowledge of the Congressional oversight and investigative process enables him to advise clients on the most appropriate strategies when preparing for, or responding to, a Congressional investigation, voluntary request for information, subpoena, or testimony under oath. During more than a decade serving on Capitol Hill, Mr. Shepherd has earned intimate knowledge of the legislative and investigative process having served as Staff Director and Chief Counsel of the Senate Permanent Subcommittee on Investigations (PSI) as well as Oversight Counsel for the House Energy and Commerce Committee. He can be reached at 202.344.4745 or rvshepherd@Venable.com.

[i] The Senate is the only branch of Congress with the authority to conduct confirmation hearings.

[ii] Richard C. Sachs, *House Committee Hearings: Types of Committee Hearings*, CRS Report 98-317 (2004).

[iii] Because Congress does not necessarily recognize the attorney-client and work-product protections, this privileged information may have to be relinquished to congressional investigators. In some circumstances, this could result in inadvertent waiver of these protections, thereby allowing criminal prosecutors and civil litigants access to confidential information. However, organizations represented by a qualified law firm familiar with congressional investigations and privileges may be able to save these protections by taking steps to ensure that these important protections are not inadvertently waived.

[iv] However, some committee investigators are infamous for their demanding, day-long and in-depth interviews.

[v] Some committees, like the Senate's Permanent Subcommittee on Investigations (PSI), are precluded from publicly releasing subpoenaed information absent an "official committee action" such as a hearing or a report.

[vi] The investigation was titled "The Defense Travel System: Boon or Boondoggle?"

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Challenging Congressional Subpoenas: Procedural Options

Law360, New York (April 09, 2014, 11:26 PM ET) -- For over two years, the House Oversight and Government Reform Committee has been investigating whether conservative groups that applied for IRS recognition of their tax-exempt status were subject to heightened scrutiny by the IRS. The committee has held multiple hearings and issued a number of subpoenas for witness testimony. One of the subpoenaed witnesses is Lois Lerner, the former head of the IRS division responsible for reviewing those tax-exemption applications. In her first appearance before the committee, Lerner insisted she had done nothing illegal and then refused to answer any questions by asserting her Fifth-Amendment right not to testify. The investigation escalated last month when Chairman Darrell Issa, R-Calif., announced his plan to pursue contempt charges against Lerner for her failure to comply with the subpoena in light of her initial statement, which Chairman Issa believes waived her right to refuse to testify. The committee is scheduled to meet this week to consider a resolution holding Lerner in contempt of Congress.

Although largely a showdown between the Republican-led House and the Obama administration, the ongoing face-off between the committee and the IRS (and between Chairman Issa and its Ranking Member, Elijah Cummings), serves as a cautionary tale for any private individual or organization that may find itself in the crosshairs of a congressional investigation. This article examines the scope and limits to Congress's investigative powers, and outlines the procedural options available to individuals and organizations to challenge a congressional subpoena.

Enforcement of Congressional Subpoenas

The recipient of a congressional subpoena essentially has two options: (1) comply with the subpoena (perhaps negotiating the scope in the process), or (2) refuse to comply and wait for the Congress to issue a contempt citation. If the subpoenaed party fails to comply with the subpoena, the issuing body must take affirmative steps to enforce the subpoena. Congress may do so either through a contempt proceeding or by seeking a declaratory judgment from a court.

Criminal Contempt Proceedings

If a party refuses to appear before a congressional committee for purposes of providing testimony or refuses to produce subpoenaed documents, the House or Senate is authorized to initiate criminal contempt proceedings against the party.[1] This process requires approval by the issuing committee, reading the committee's report on the floor of the whole chamber, a vote by the House or Senate, and then a certification to the U.S. Attorney (generally of the District of Columbia). Under the statute, the U.S. Attorney then has a "duty" to bring criminal charges. If indicted and convicted, a person faces a fine of up to $100,000, and imprisonment for up to one year.

This process is rarely acted upon. Although the statute specifies that the U.S. Attorney has the "duty" to bring criminal charges, courts have generally afforded federal prosecutors broad prosecutorial discretion to bring — or not bring — charges, even where a statute uses mandatory language. Prosecutorial discretion was the basis of the U.S. Attorney's decision not to present the grand jury with contempt citations of EPA Administrator Anne Gorsuch Burford in 1982, former White House Counsel Harriet Miers and White House Chief of Staff Joshua Bolten in 2008, and Attorney General Eric Holder in 2012. No court has ever been asked to consider the bounds of this discretion nor has one ever compelled a prosecutor to bring a contempt charge. Thus, many contempt citations, especially those related to government officials, are never carried through. The case is somewhat different in the case of private parties. Although there have been several resolutions considered and passed by the House and Senate holding private citizens in contempt of Congress, in the majority of cases the parties subsequently agreed to cooperate.

Civil Action to Enforce Subpoena

Given the potential for political conflict with the prosecutor responsible for bringing criminal contempt, Congress has enacted a civil contempt statute, which allows Congress to go to court directly. Although the statute as written applies only to the Senate, the House has initiated similar suits.[2] Under the statute, the Senate may file a lawsuit in the district court for the District of Columbia to enforce subpoenas. The suit may either ask the court to order compliance with the subpoena, or for a declaratory judgment validating the subpoena. By obtaining a declaration first, Congress affords the subpoenaed party another opportunity to comply before being compelled by a court order.

Although the House of Representatives has no comparable civil enforcement statute, in recent years it has used this process to compel compliance. For instance, in the summer of 2012, the Committee on Oversight and Government Reform took legal action to enforce a subpoena it issued to Attorney General Eric Holder in connection with its investigation of Operation Fast and Furious. First, the committee voted to hold Holder in criminal and civil contempt. One week later, the entire House voted to hold the attorney general in criminal contempt. The resolution directed the Speaker to certify the contempt citation to the U.S. Attorney for prosecution (which never occurred). The House also passed a second resolution authorizing Chairman Issa to initiate judicial proceeding on behalf of the committee to seek declaratory judgment requiring Holder to comply with the subpoena. Two months later, the committee filed a lawsuit in court to enforce the subpoena. The lawsuit, which survived the attorney general's motion to dismiss, remains pending in court.

The civil enforcement process is more expeditious than contempt proceedings alone and also is more effective in securing compliance with the subpoena. That is because sanctions can be imposed until the subpoenaed party agrees to comply, thereby creating an incentive for compliance. A finding of contempt of court can result in imprisonment and/or a fine. A federal court can hold either an individual or corporate entity in contempt and has wide latitude in exercising its contempt powers.

Challenging the Validity of a Congressional Subpoena

While wide-ranging, Congress's power to investigate, and the power to issue subpoenas, does have limits. Courts have articulated three general sources of these limits:

(1) An investigation must be related to a valid legislative purpose, such as enacting legislation, appropriating funds, deciding whether or not legislation is necessary, or overseeing the administration of the laws by the executive branch. The investigative power cannot be used "to expose the private affairs of individuals without justification in terms of

the functions of the Congress ... [n]or is the Congress a law enforcement or trial agency."

(2) A committee may only investigate matters within the scope of the committee's delegated authority. To determine what a committee's authority is, courts look to various sources including the committee's authorizing rule or resolution and the remarks of the committee's members.

(3) The subpoenaed materials or testimony must be related to the subject under inquiry. This relevance standard is broader than the standard under the laws of evidence. Where an investigative subpoena is challenged on relevancy grounds, the Supreme Court has said that the subpoena is valid "unless the district court determines that there is no reasonable possibility that the category of materials the government.

Notwithstanding those broad pronouncements, it is extremely difficult to successfully challenge the authority of a committee to conduct a particular investigation. Courts generally presume that Congress has a legitimate legislative purpose when it exercises its investigative power, even where the resolution or rule authorizing the investigation does not identify one. Moreover, courts have made it clear that so long as Congress acts pursuant to a legitimate legislative purpose, they will not look at Congress's motives behind those actions. Courts will intervene only if it is apparent that the investigation has no connection to legislative action. As the Supreme Court has explained:

> There is no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress. Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.[3]

In sum, unless the subpoenaed party can show that the subpoena falls entirely outside the "sphere or legitimate legislative activity," the actions of individual members of Congress and congressional committees likely will be considered immune from judicial interference. And, as should be clear from the enforcement process, there is no way to make these arguments until Congress has found that person in contempt and brought the case to court for enforcement (either civilly or criminally).

Practical Considerations

As the events surrounding Lerner's refusal to testify before the House Oversight and Government Reform Committee so plainly demonstrate, responding to a congressional request for information is a highly complex and delicate matter, in particular where a committee has issued — or threatens to issue — a subpoena. It requires careful consideration of various legal and nonlegal issues, such as waiver of the attorney-client privilege, the risk of self-incrimination, costs (both monetary and reputational) and political fallout.

Since the mid-1990s, congressionally issued subpoenas have become more commonplace, and, given the upcoming politically charged election season, could become even more unexceptional. Given the breadth of Congress's investigative power and the leeway courts have given committees, parties subject to a legislative subpoena face considerable obstacles if they choose to pursue a strategy of noncooperation and resistance. Often, the best response is a combination of careful negotiation with committee staff, good preparation for a hearing, and fulsome responses to document requests if at all possible.

—By Raymond V. Shepherd III, Ronald M. Jacobs and Alexandra Megaris, Venable LLP

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[1] Congress also has what is referred to as "inherent" contempt power to bring a party before the House or Senate by the Sergeant-of-Arms, try him at the bar of the body, and imprison or detain him in the Capitol (or elsewhere). The inherent contempt process, however, has not been used by either the House or Senate since 1935.

[2] 28 U.S.C. § 1365.

[3] 354 U.S. 178, 187 (1957).